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In the

Supreme Court of the United States.

October Term, 1918. No. 943.

T. M. DUCHE & SONS (BUENOS AIRES), LTD.,
Petitioner,

v.

AMERICAN SCHOONER "JOHN TWOHY," HER TACKLE, ETC., ALBERT D. CUMMINS AND HOWARD COMPTON,
Claimants.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF ON BEHALF OF PETITIONER.

I. ABSTRACT AND STATEMENT OF THE CASE.

The schooner "John Twohy," warranted to be "*tight, staunch, strong and in every way fitted for the intended voyage,*" was chartered by the claimants to the libellant to carry a full and complete cargo of bones from Buenos Aires to Philadelphia.

The "Twohy" was a reclaimed wreck. When she sailed from Philadelphia for South America to enter on the performance of this charter she had just undergone repairs after having lain in a badly wrecked condition for fifteen months. In the course of her outward voyage, it appeared that she was leaking, the extent of the leak and other conditions attending her

outward voyage being unobtainable because of the destruction of her log by claimants after this suit was brought, but before hearing.

On October 21, 1915, having loaded a full cargo, the "Twohy" sailed from Buenos Aires bound for Philadelphia, where she arrived December 28, 1915, and discharged her cargo, a large part of which was found to be wet and damaged. In addition to delivering a part of the cargo in a damaged condition, the ship wholly failed to deliver 149,069 pounds of the bones called for by the bill of lading, which admitted without any qualification whatsoever, the receipt of 1,210,000 kilos, equivalent to 2,670,345 pounds.

The libel in this case set forth two claims: One for short delivery and the other for injury to part of the delivered cargo, both arising out of the unseaworthy condition of the ship.

It appeared that when the vessel was only about nine days out from Buenos Aires she encountered weather which was slightly rough, but not more severe than was to be expected at that time and place. During this rough weather she began to leak badly and continued to do so for the rest of the voyage, the leakage being at the rate of about six inches of water an hour, necessitating pumping every two hours, there being at one time as much as five feet of water in the hold.

The libellant contended that the loss and damage was due to the unseaworthiness of the vessel, the claimants, defending, that it was due to perils of the sea within the exceptions of the charter party and bill of lading.

The Court below found the vessel unseaworthy and awarded libellant damages for the injury to the part of the cargo delivered, but on the ground that libellant's proof did not sufficiently demonstrate the amount

of the short delivery, refused to award libellant any damages on account of that claim.

A final decree was entered on April 16, 1918, and on April 27, 1918, an appeal was taken by the claimants to the Circuit Court of Appeals of the Third Circuit.

This appeal came on for argument in October and November, 1918, and on each occasion was continued at the request of the appellants. It again came on in December, 1918, when the appellants moved for leave to withdraw their appeal.

This motion was opposed by the petitioner here, but on February 10, 1919, the Circuit Court of Appeals over the protest and without the consent of the petitioner, in an opinion by Judge Buffington (Record, p. 204), granted the motion, provided the claimants paid the amount of the decree of the District Court with interest and costs within thirty days, which payment the claimants offered to make.

On March 14, 1919, a final decree (Record, p. 206a) was entered in the Circuit Court of Appeals ordering the dismissal of the appeal.

On March 28, 1919, the petitioner filed with the Supreme Court of the United States its petition for a writ of certiorari. This petition was granted and on April 17, 1919, the certiorari issued, and with the return thereto, was received and filed in the office of the Clerk of the Supreme Court on May 7, 1919.

The questions of law presented under these facts and raised on this certiorari are the following:

I. Where a libellant in admiralty recovers a part of his claim in the District Court, and is denied the balance thereof, and the respondent appeals to the Circuit Court of Appeals, can the respondent-appellant thereafter, and after the expiration of the time limited

for an appeal by the libellant, withdraw his appeal over the protest and without the consent of the libellant-appellee?

II. Under such facts is it within the legal discretion of the Circuit Court of Appeals to permit the appellant to withdraw its appeal over the appellee's objection and without its consent?

III. When a libel is filed to recover for short delivery and for cargo damage, and the Court finds the vessel unseaworthy and allows recovery for the cargo damage, can it refuse to allow for the short delivery on the ground that it is not sufficiently proved and assume that there is an error in the bill of lading weight, in a case where the burden is on the ship to exonerate itself and the Master testifies that he delivered all the cargo he received but leaves entirely unexplained and does not exclude an explanation of the shortage under which the ship would be liable, and which is supported by the overwhelming weight of the evidence?

II. SPECIFICATION OF THE ERRORS RELIED UPON.

The petitioner relies upon and assigns the following errors:

1. The Circuit Court of Appeals erred in granting the motion of the appellants below for leave to withdraw their appeal.

2. The Circuit Court of Appeals erred in refusing to dismiss the motion for leave to withdraw its appeal.

3. The Circuit Court of Appeals erred in refusing to hear and determine on the merits the appeal taken

from the District Court for the Eastern District of Pennsylvania in this cause.

4. The Circuit Court of Appeals erred in not considering on the merits the claim of the appellee in that court, the petitioner here, for additional damages for short delivery.

5. The Circuit Court of Appeals erred in refusing to grant the petitioner damages for short delivery which had been refused in the District Court.

III. ARGUMENT.

The questions raised in this case may for convenience be divided into two groups or classes, those relating to the question of practice and those relating to the merits. Primarily the case is before this Court on the question of practice but as this question can be best understood and decided with reference to the particular facts, we desire for the sake of clearness and orderly consideration, to present first, as briefly as possible, the points raised on the merits.

The questions involved in the Circuit Court of Appeals were novel ones, of great importance in the admiralty practice, not heretofore decided by this Court or any other Federal Court; the decision of the Circuit Court of Appeals in this case is erroneous, tends to complicate the admiralty practice, is contrary to and to a large extent nullifies important decisions of this Court of such long standing as to have become settled law, and if allowed to stand unreviewed and uncorrected by this Court will, in many cases, as it has in this, work the greatest injustice to suitors who act in reliance upon the decisions of this Court for the protection of their rights and the conduct of their litigation.

Two issues were raised in the District Court—*First*, the seaworthiness of the "*John Twohy*," and, *Second*, the amount of the loss. The second issue had two branches: (a) Loss arising from damage to part of the cargo delivered; (b) loss arising from short delivery.

The District Court found the vessel unseaworthy and awarded damages for injury to the cargo delivered, but denied recovery for the short delivery.

1. The "John Twohy" Was Unseaworthy.

The evidence clearly established the unseaworthiness of the "John Twohy" as the cause of the loss.

In considering this branch of the case four points should be borne in mind:

First.—The provision in the charter party that the vessel is "*tight, staunch, strong and in every way fitted for the intended voyage*" is an absolute warranty of seaworthiness even against latent defects.

The Edwin L. Morrison, 153 U. S. 199;
The Lockport, 197 Fed. 213;
The Caledonian, 42 Fed. 681.

Second.—The Harter Act, which is not mentioned in the charter, does not operate to relieve the owner or the vessel from liability for the consequences of unseaworthiness, even where it is proved that the owner exercised due diligence to make the vessel seaworthy. It is incumbent on the owner to provide a seaworthy vessel, unless *by contract* he limits his obligation to the exercise of due diligence to make her so.

The Carib Prince, 170 U. S. 655;
The Sandfield, 92 Fed. 663;
Farr & Bailey Co. v. International Navigation Co., 98 Fed. 636;

The Ninfa, 156 Fed. Rep. 512;
The Indrapura, 190 Fed. Rep. 711.

Third.—There is no provision in the charter party limiting the obligation of the owners to provide a seaworthy vessel or reducing their obligation in that connection to the exercise of due diligence to make the vessel seaworthy.

Fourth.—The burden of affirmatively proving the seaworthiness of the vessel at the time of loading the cargo, and at the commencement of the voyage, rests upon the ship owner.

International Navigation Co. v. Farr & Bailey Co., 181 U. S. 218;
The Wildcroft, 201 U. S. 378;
Bradley v. Lehigh Valley Co., 153 Fed. 350.

With these points in mind let us consider the facts in the case, which are essentially undisputed. These clearly appear of record, and are as follows:

The "John Twohy" is an old schooner, which, when built in 1891, was not properly fastened and became badly hogged (Cummins, p. 145). In November, 1913, she was wrecked off the North Carolina coast, and from that time until February, 1915, was lying in a wrecked condition at Southport, North Carolina, and at Philadelphia (Record, p. 27).

During the period from February to June, 1915, the "Twohy" was repaired and strengthened, and on June 18, 1915, sailed from Philadelphia with a cargo of lumber, bound for Rosario on the River Plate, where she arrived the early part of September (Record, p. 30). On her outward voyage she was found to be leaking, and at the conclusion thereof, the captain removed a turnbuckle rod which had been placed athwartships near her bow and plugged the holes,

after which she proceeded to Buenos Aires to load the cargo of bones here involved (Record, p. 28).

Of the details of the outward voyage we have no information owing to the loss or destruction of the log of the vessel during the pendency of this action (Record, pp. 103, 148, 149). The only information which we have is that on that voyage the "Twohy" leaked to such an extent that the master felt it necessary or advisable at the end of the voyage to remove a turnbuckle rod which had been put in to strengthen her, and plug the holes (Record, p. 28).

The testimony is that the master did this on his own responsibility without having a survey of the vessel made at Buenos Aires (Record, p. 154).

The claimant produced a number of witnesses, all of whom swore that the turnbuckle rod was entirely unnecessary, added nothing to the strength of the vessel, and had no effect on her strength whatsoever; the claimant himself passes off the presence of the turnbuckle rod as a "whim of mine" (Record, p. 143).

But after the discharge at Philadelphia of the cargo here in question—the turnbuckle rod that had been taken out was, by order of the claimant, put back in the vessel again, at exactly the same place from which it had been taken (Record, p. 148).

This fact alone is sufficient to impeach, if not utterly to discredit, the testimony that the turnbuckle rod was useless and unnecessary.

The true function which this rod did perform, and was in the vessel to perform, was to hold her together and strengthen her and the effect of taking it out was to let her settle back and loosen her seams (Mowatt, pp. 98, 99), *all of which were recalked and recemented after she discharged her cargo at Philadelphia* (Record, p. 134).

It is submitted that the above facts alone are sufficient to show that the vessel was unseaworthy. Supplemented, however, as this testimony is by the other evidence, and the facts as they developed on the voyage, the unseaworthiness of this vessel at the inception of the voyage here involved is clearly and undeniably established.

The vessel left Buenos Aires on October 21, 1915, bound for Philadelphia. Here again we are confronted with the loss or destruction of the log book pending this action. The extended protest made by the master upon arrival at Philadelphia gives us no details of the weather, the progress of the vessel, or the amount of leakage for the days from October 21st to October 29th.

The first detail appearing from the protest and from the other evidence before the Court is that of October 30th, when the weather became a little heavy and continued so for a day and a half.

This, however, was ordinary bad weather, nothing extraordinary or unexpected. As stated by the master (Forsyth, p. 157):

> "Q. How would you describe this voyage which you made from Buenos Aires up to Philadelphia with the cargo of bones?
>
> A. About the usual thing. I suppose you would have about eighty per cent. fine weather and the rest bad, twenty per cent. bad."

Forsyth, pages 164-5:

> "Q. You say you had a northeast gale and that you very often do not get those kind of gales?
>
> A. When is this?
>
> Q. On the way back.
>
> A. Oh, yes.
>
> Q. But, you do get, I have you down, as getting a northwest gale?

A. Yes.

Q. And you expect that southwest?

A. The northwester—when it gets into the northwest the first thing you know it jumps from the northwest to the southwest.

Q. And it is customary to have southwest gales in that season of the year at that point, is it not?

A. Yes, you will get southwest gales down there. You can look for them all times of the year, but of course there is more southwest wind down around the river from June, July, August and September.

Q. And this season of the year, that gale was unusual?

A. Which one?

Q. The one that you had, the northeast gale?

A. No—in October.

Q. It was not unusual?

A. This southwest gale in October?

Q. Yes.

A. That is very strong down there. No, it was not an unusual thing to get the southwest gale. You expect those things, you look for them.

Q. You talked about northwest gales you don't look for?

A. No.

Q. But they are about the same as the southwest gales, are they?

A. About the same as what our southwesters are around here. You can reverse them, and you have it down pretty near."

Forsyth, page 167:

"Q. And the hatches were battened down all the way during the voyage and the only water that came in over the top of the vessel and got in was in the cabin?

A. Yes.

Q. And the cabin door was open at the time this wave happened to strike the vessel?

A. Exactly.

Q. During this voyage were any of the deck fittings torn away from the vessel? No damage was done to the deck fittings of the vessel, was there?

A. I don't remember. I don't think so.

Q. No lifeboats carried away or anything of that sort?

A. No."

Forsyth, page 168:

"Q. You have told us that the vessel was leaking six inches per hour?

A. Yes, six inches per hour.

Q. Is that ordinary or extraordinary?

A. I think it is too much.

Q. How long did that continue?

A. From the time we got that northwest gale of wind until—of course, she always made lots of water after that, but she wouldn't make as much in moderate weather, she wouldn't make as much as when she would get into a blow, tumbling and slapping around.

Q. Did you ever have any sounding made as to the amount of water in the hold?

A. Yes, after she sprung that leak, we sounded her pretty much all the time, always somebody with the sounding rod in their hand.

Q. What was the greatest amount of water you had?

A. It seems to me at one time we had five feet."

A reference to the protest shows that the voyage consumed altogether sixty-nine days, out of which there were six days of bad weather—less than ten per cent. bad—whereas the master states (Forsyth, p. 157), that on the average voyage between Buenos Aires and Philadelphia at that season of the year the average weather would be about twenty per cent. bad—and as set forth in the testimony above quoted (Forsyth, pp. 164-165, 167, 168), the bad weather experi-

enced was nothing unusual—"just about the usual thing," "what you would expect"—"just what you look for."

The whole truth is that this vessel had an exceptionally good voyage, and had unusually good weather.

It is most important to notice that in the very first bad weather that this vessel encountered after leaving Buenos Aires she began to leak very badly. The bad weather encountered after the first day therefore cannot be taken into consideration.

The fact that the vessel could not stand even a few hours of an ordinary storm, not an unusual one, such as could be classed as a sea peril, but an ordinary usual storm such as was to be expected, anticipated and looked for—furnishes the most satisfactory evidence that she was not seaworthy at the inception of her voyage.

The burden clearly rests upon the claimant to prove that the "John Twohy" was, at the inception of the voyage, in all respects seaworthy. This is so well established that we presume it will be conceded, and in fact to do more than cite the cases above mentioned (p. 4) seems entirely unnecessary. The rule is, perhaps, as well stated as anywhere, in the case of *Benner Line v. Pendleton*, 210 Fed. 67 (D. C. S. D. N. Y.), where, at page 72, Judge Holt says:

> "I have no doubt that the owners believed her to be seaworthy, and that Captain Fletcher, a very competent man, to whom the owners had intrusted the duty of putting the ship in order, believed her to be seaworthy.
>
> "But the obligation upon the owners of a ship according to the maritime law, is that the ship must be in fact seaworthy at the commencement of the voyage, and it is entirely immaterial whether the owners believe her to be seaworthy, or have used every reasonable effort to make her sea-

worthy. If she was not in fact seaworthy when the voyage began, the owners are liable under the general rules of the maritime law unless such liability is limited by the statutes limiting the liability of shipowners."

The only testimony offered by the claimant as to the seaworthiness of the "John Twohy" is the cost and extent of repairs made upon her after she had been lying a wreck for sixteen months, the certificate of the American Bureau of Shipping, the free and easy statements of the men who repaired her (and who are not shown to have had any seafaring experience), all of which testimony relates to a time prior to the voyage preceding the one here in question. The details of the prior voyage, and what effect it may have had upon the vessel we are unable to learn, because of the destruction of the ship's log while this action was pending.

Opposed to the claimant's evidence, are the facts above outlined coupled with the fact that this vessel, although encountering nothing more than the usual and to be expected weather, sprung such a bad leak, and was in such condition, that, after the discharge of her cargo, her seams had to be recaulked and recemented, and repairs costing upwards of $2000 had to be made to her hull.

It is submitted that the claimant did not sustain the burden resting upon him to prove affirmatively the seaworthiness of the vessel.

On this point the present case is squarely ruled by the case of *Benner Line v. Pendleton*, 210 Fed. 67 (D. C., So. D. N. Y., 1913), affirmed in this particular, in the Circuit Court of Appeals of the Second Circuit, 217 Federal 497, which was in turn affirmed, on certiorari, by the Supreme Court, 246 U. S. 353 (1918), where the question of seaworthiness was disposed of

by Mr. Justice Holmes, who, in delivering the opinion of the Court, said:

> "The ground of the suit is that the vessel was unseaworthy at the beginning of the voyage, and that by reason thereof she sank, and her entire cargo was lost. Both Courts below held that the unseaworthiness was proved, and on the evidence that question may be laid on one side."

In that case an action was brought against the owners of the schooner "Edith Olcott," which three or four days after leaving port sank with all her cargo.

The owners of the vessel in an effort to prove seaworthiness showed that the vessel was carefully inspected, overhauled and put in order by a thoroughly competent man before the voyage. One of the experts who examined her before she started on her voyage reported that she was "in the pink of condition." Witnesses, who examined her, testified that they found her seams and butts in first-class order, as were her rigging, decks, waterways and chain plates, and that she was "in first-class condition," "one of the finest vessels" the witness had ever seen, and "fit to go around Cape Horn in."

The superintendent of the Dry Dock Company testified that she was tight, staunch and strong. The inspector of the American Bureau of Shipping testified that the vessel was "first class," that she had been thoroughly examined for reclassification in 1905, and was given an A1 rating for six years—a rating which would have expired one year after she was lost. He stated that the "Edith Olcott" was "exceptionally well built, exceptionally well cared for, and an exceptionally good vessel at the time she was lost," and that she had the highest rating ever given to a vessel of her age—having been built in 1890. The evidence given by other inspectors was to the same effect.

Clearly the evidence offered in that case as to the seaworthiness of the vessel was much stronger both in quantity and degree than that offered in this case now at bar. Yet the Court found in the case cited:

> "But admittedly the weather was not heavy until the night before the leak, and although from that time until the ship was abandoned there was heavy weather there was nothing so extraordinary about it that a ship in proper condition to make an ocean voyage should not have been in condition to undergo the strain. . . . I have no doubt that her owners believed her to be seaworthy. But facts in such a case speak louder than words, and the fact that she sprang so bad a leak on the first night of heavy weather that occurred upon the voyage, and that there is no adequate explanation given of it, is, in my opinion, not consistent with her being seaworthy at the beginning of the voyage."

This decision of Judge Holt was affirmed on appeal in *Benner Line v. Pendleton*, 217 Fed. 497, where in writing the opinion of the Circuit Court of Appeals, Judge Rogers, after discussing the evidence very carefully, said (p. 501):

> "But neither the good intentions of the respondent nor the competency of this captain can save the respondent from liability if, notwithstanding what was done the vessel was not in reality in a seaworthy condition when this voyage was commenced.
>
> "To constitute seaworthiness the hull must be so tight, staunch and strong as to be competent to resist all ordinary action of the sea and to prosecute and complete the voyage without damage to the cargo."

And again at page 503:

> "While the weather was heavy, there was nothing so extraordinary about it that a ship in a seaworthy condition should not have been able to

> stand the strain. The fact that the vessel sprang so bad a leak, and that no satisfactory explanation of the fact has been made, indicates to us, as it did to the Court below, that the vessel was not seaworthy as to her hull at the beginning of the voyage."

The only points upon which the case just cited and quoted can be distinguished from the case at bar is that the loss was more serious.

Essential fact for essential fact the cases are identical and the words quoted from the opinions of the courts apply even more strongly to the present case than to the case in which they were written, and the decision in that case flatly rules this one.

Other cases without number might be cited to the same effect, but it is perhaps unnecessary to do more than state as briefly as possible the holdings of a few of them.

In *Atlas Portland Cement Co. v. P. Dougherty Co.*, 205 Fed. 508 (C. C. A., 2nd Circuit), a libel was filed to recover for damage by sea water to a cargo of cement.

In support of a defense based on perils of the sea, respondents showed that the vessel encountered very heavy weather, twice broke her tiller and that her gasoline engine broke down, rendering her pumps useless.

The Circuit Court of Appeals affirmed the decree in favor of the libellant on the opinion of Judge Veeder, who said:

> "In the first place, the evidence fails to show that the 'Patuxent' encountered any peril of the sea. None of the witnesses called by the respondent placed the velocity of the wind any higher on the Beaufort Scale than a fresh gale; they put it between forty and fifty miles an hour. . . . In

others words, there is nothing to indicate that the weather encountered was anything beyond what was to be expected along the coast in the autumn."

In *The Erskine M. Phelps,* 231 Fed. 767 (D. C. N. D. Cal. [1915]), Judge Dooling, holding a vessel not excused by perils of the sea, said:

> "But the storms encountered were not greater than might reasonably have been expected in rounding the Horn at that season of the year and in accepting this shipment, it must be presumed that it was accepted in view of the character of the goods, the character of the crating and the weather likely to be encountered."

See, too, the language of Judge Holt in *The River Meander,* 209 Fed. 931 (U. S. D. C., So. D., N. Y.), 1913:

> "In the first place there can be no presumption (of seaworthiness) in such a case as this. The Wildcroft, 201 U. S. 378, 26 Sup. Ct. 467, 50 L. Ed. 794. It must be affirmatively proved by the ship owner. Now there is no evidence in this case that the vessel was seaworthy when she began her voyage.
>
> "In my opinion, if a ship is shown to be unseaworthy during a voyage, the inference may be drawn, in the absence of any explanation to the contrary, that she was unseaworthy when she started. Cargo owners usually cannot prove unseaworthiness at the time a voyage begins.
>
> "It is the duty of the ship owner to know that his ship is seaworthy before the voyage begins, and if he does know it he can prove it. If a vessel proves to be unseaworthy during a voyage the burden should be on the ship owner to prove affirmatively that she was seaworthy at the time the voyage began."

The claimant here does not know and did not know whether or not the vessel was seaworthy on this voyage.

His attitude is perhaps best illustrated by his testimony (Cummins, pp. 150-151):

"Q. Never heard that the vessel leaked on that voyage going down?

A. Yes.

Q. You heard that?

A. Yes.

Q. How much did the vessel leak on the voyage going down?

A. The captain will answer that. I don't know. I wasn't aboard.

Q. What did the captain report to you?

A. The vessel leaked.

Q. How much of a leak?

A. Didn't report how much.

Q. Did you look at the log book when the captain brought it back to see?

A. No.

Q. The log book showed, didn't it?

A. I don't know, I didn't look at it.

Q. The fact is the vessel leaked?

A. I don't know.

Q. You don't know anything about that?

A. I know it leaked. I don't know how much.

Q. You never even looked in the log book to see how much it leaked?

A. No, She got there and back, that is all I was interested in.

Q. That is all you care, so it went down to South America and got back again?

A. Yes."

Can anyone contend that the above testimony is that of a careful, prudent ship owner? Clearly it cannot be said that it is. Nor is the language of an owner who is performing his duty, which, in the language of Judge Holt, is, "to know that his ship is seaworthy before the voyage begins."

See, too, the very recent case of *Compagnie Maritime Francaise v. Meyer*, 248 Federal 881 (C. C. A.,

9th Circuit, 1918), where a French bark, within four days after leaving Brest on a voyage from Rotterdam to San Francisco, without having encountered weather which was unusual at the season, was found to be leaking so that she had to be pumped each day thereafter until she reached the vicinity of Cape Horn, when, meeting stormy weather, the leak increased, and she was obliged to seek a harbor of refuge. It was held that she was unseaworthy at the beginning of the voyage, although surveyed at that time, and the libellants were awarded damages for the breach of the warranty of seaworthiness.

In delivering the opinion of the Circuit Court of Appeals, Judge Gilbert said (p. 883):

> "The evidence was that such weather was not unusual or unexpected in that vicinity at that season of the year. It has been held by this court and by other courts that the development of a serious leak, occurring from no mishap or accident within a short period of time from leaving port, is evidence from which it may be presumed that the vessel was not seaworthy at the time of leaving. In The Warren Adams, 74 Fed. 413, 20 C. C. A. 486, Judge Wallace, for the Circuit Court of Appeals for the Second Circuit, said:
>
> "'Where a vessel, soon after leaving port, becomes leaky, without stress of weather or other adequate cause of injury, the presumption is that she was unsound before setting sail.'

"Other decisions to the same effect are Pacific Coast S. S. Co. v. Bancroft-Whitney Co., 94 Fed. 180, 36 C. C. A. 135; The Aggi (D. C.), 93 Fed. 484; The Arctic Bird (D. C.), 100 Fed. 167; Oregon Bound Lumber Co. v. Portland & Asiatic S. S. Co. (D. C.), 162 Fed. 912; Steamship Wellesley Co. v. C. A. Hooper & Co., 185 Fed. 735, 108 C. C. A. 71; Carolina Portland Cement Co. v. Anderson, 186 Fed."

In *The Edwin L. Morrison*, 153 U. S. 199, at page 210, Chief Justice Fuller, delivering the opinion of the Court, said:

> "By the charter party it was agreed on the part of the vessel that she should be tight, staunch, strong and in every way fitted for the voyage, and the rule is well settled that the charterer is bound to see that his vessel is seaworthy and suitable for the service for which she is to be employed, while no obligation to look after the matter rests upon the owner of the cargo. The Northern Belle, 9 Wall. 526; Work v. Leathers, 97 U. S. 379. If there be a defect, although latent and unknown to the charterer, he is not excused. 3 Kent, *205, Valin, Com. Ord. de la Mar. liv 111, tit. 111. Du Fret; Art. XII, Vol. 1, 654; Lyon v. Mells, 5 East. 428; Work v. Leathers, supra.
>
> "As said on circuit by Mr. Justice Gray, in The Caledonia, 43 Fed. Rep. 681, 685: 'In every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the ship owner that the ship is seaworthy at the time of beginning her voyage, and not merely that he does not know her to be unseaworthy, or that he has used his best efforts to make her seaworthy. *The warranty is absolute that the ship is, or shall be, in fact, seaworthy at that time and does not depend on his knowledge or ignorance, his care or negligence.*'"

And in the *Babin Chevaye*, 208 Fed. 966 (1913), Judge Wolverton, quoting with approval from Ceballos v. The Warren Adams, said at page 975:

> "Where a vessel, soon after leaving port, becomes leaky, without stress of weather, or other adequate cause of injury, the presumption is that she was unsound before setting sail. The law will intend the want of seaworthiness because no visible or rational cause, other than a latent or inherent defect in the vessel, can be assigned for the result."

In the present case there is not even a suggestion that the weather encountered was any more severe than was ordinarily to be anticipated at that time and place. The only testimony on this point is that of the master—the claimant's own witness—and that establishes clearly and indisputably that the weather encountered by the "John Twohy" on this voyage was not only not worse than was ordinarily to be expected at that time and place, but was actually much better weather than could have been anticipated.

In *The Aggi*, 93 Fed. 484, it was held that storms, although they may have been adequate cause for the damage, will not relieve the carrier where they are not of such unusual character but that they should have been anticipated.

And in *The Orcadian*, 116 Fed. 930, it was held that where the weather is not more severe than is to be expected from the season and the locality, perils of the sea is no defense.

The only evidence which claimant presents as to seaworthiness is confined to the time the vessel left Philadelphia—what may have happened to the vessel on her outward voyage, what weather she may have encountered, what obstructions she may have hit in the river, what strains she may have been subjected to before loading this cargo of bones, are all in the dark and unknown.

Because of the destruction of the ship's log book by the claimants while this action was pending, we are unable to obtain any evidence as to this outward voyage. It is entirely possible that events occurring on that outward voyage may have rendered her entirely unseaworthy before she reported at Buenos Aires for the voyage here involved.

The destruction of this log opens the way and entitles the libellant to the benefit of the presumption that had the log been produced, its contents would have been unfavorable to the claimants' case.

The rule is well stated by *Professor Wigmore* in his work on *Evidence*, Vol. 1, Sec. 291, page 383, where, after carefully considering the cases, he says:

> "The failure or refusal to produce a relevant document, or the destruction of it, is evidence from which alone its contents may be inferred to be unfavorable to the possessor."

The claimants' failure to produce evidence as to the seaworthiness of the schooner at the inception of this voyage and the fact that they confined their testimony to a point of time prior to her outward voyage from Philadelphia to Rosario, coupled with the destruction of the log, are, we submit, sufficient to warrant a finding by the court that the outward voyage developed and made clear defects in the vessel that demonstrated her unseaworthiness before the inception of this voyage.

The claimant's witnesses have been most insistent upon the point that all wooden vessels leak to some extent. If this is so, and is such a matter of common knowledge, then it is clear that no mention would be made of this ordinary leakage by the vessel on its outward voyage. Yet Cummins testifies (pp. 150-151) that the master reported to him that the vessel was leaking on her outward voyage.

The only explanation of this report would seem to be either that the testimony that all wooden vessels leak to some extent, is false, which we do not believe, or that on this outward voyage the leakage of the "Twohy" was excessive, which we do believe. Under either explanation the "Twohy" was unseaworthy, and of this unseaworthiness her master and owners had knowledge.

The claimants have endeavored at great length, as did the owners of the "Edith Olcott" in the case of Benner Line v. Pendleton, to establish the seaworthiness of the vessel. Like the owners of the "Edith Olcott" they have failed to do so, and have failed because the facts were against them and the vessel was not in fact seaworthy at the inception of the voyage as the subsequent events clearly and undeniably proved.

The burden was clearly on the claimants and the vessel to establish the seaworthiness at the inception of the voyage, and just as clearly they have entirely failed to support this burden.

We submit that this case is flatly ruled by the decision of the lower courts, affirmed by this court in the case of the *Benner Line v. Pendleton*, above quoted, and that it cannot be seriously contended that the "John Twohy" was seaworthy at the time of the inception of her voyage here in question.

For the damages flowing from this unseaworthiness it is clear that the libellant was entitled to a decree.

2. The Loss and Damage.

As above set out, libellant's damages were of two kinds, viz.:

(a) Loss arising from injury to a part of the cargo delivered in a damaged condition.
(b) Loss arising from the non-delivery of a portion of the cargo.

These items we will consider in order.

A. Loss Arising From Injury to a Part of the Cargo Delivered in a Damaged Condition Was Properly Awarded to Libellant.

It is for this item that the Court below awarded to the libellant, the full amount claimed. The facts in this connection are these:

A part of the cargo, weighing gross 389,407 pounds was found on its discharge to be wet and very dirty (Record, p. 57). Burrichter, a witness for the libellant, describes this part of the cargo (Record, p. 75):

> "Those bones were removed from the hold when we reached down close to the skin of the vessel, down near the keel, and we had notified the owners of the cargo that they were being taken out wet. We were instructed to put those aside. We had piled them in a distinct pile from the sound portion, and they were very dirty, very dark, and wet with water, soaked, and with an oily substance which had come out of the keel, and those bones were a very unsatisfactory portion of the cargo."

and again, the same witness (Record, p. 82):

> "I think I called them dark, dirty bones, very wet, and covered with mud, and slime coated from the bottom of the vessel."

These wet and damaged bones weighed 389,407 pounds gross (Lyons, Record, p. 57). By tests conducted by the consignees it was determined that the excess moisture was sixteen per cent. or 62,305 pounds, making the net weight of damaged bones 327,102 pounds (Burrichter, Record, pp. 77-78; Stoehr, Record, pp. 62-63). The libellant settled with the buyers of the bones and took payment on the basis of this excess moisture determination (Burrichter, p. 78), and the claimants here settled their claim for freight on the same basis (Record, pp. 38, 71).

The undisputed evidence of the witness Burrichter is that these damaged bones were worth $5.70 per ton less than the sound portion of the cargo which was worth $27 per net ton; the damaged bone being worth only $21.30 per net ton.

Burrichter testified that $21.30 was a fair price for the damaged bone, and the market price so far as

there was a market, that it was the price at which the sellers of the bone settled with the purchasers of the cargo after extensive inquiries and offers to sell to others (Burrichter, Record, pp. 78, 79, 80, 91, 94).

This evidence is not in any way impeached, contested or controverted by the claimants and may be taken as conceded.

It is in fact supported by the clear evidence of the witness Stoehr, who testifies (Record, pp. 66, 69), that the damaged bones were found to be deficient in their most essential elements, ammonia, and phosphoric acid, and by the statement of Burrichter (Record, pp. 80, 81), where he testified as follows:

> "Q. What was necessary to be done for these bones to make them saleable?
>
> A. There were four or five different expenses. The first one was the expense in connection with the handling of these bones because they had been separated from the sound portion. That meant carting and handling to a separate pile. The bones had to be dried out before they could be used. They were very dirty and wet. They could not be used in the mill by themselves. The chemist explained that they were deficient in ammonia and phosphoric acid. In order to make them available to use, it was necessary to buy high-priced material, which runs very high in nitrogen, or ammonia, which is the trade term, and combine it with the bones. Also it was necessary to use a small percentage in the grinding of the wet bones with a good portion of the sound bones. You cannot grind wet bones. They will give a bone meal which results very dark in appearance. They were dirty. We cannot sell dark bone meal. It is necessary to put it in with the whiter, cleaner bones, making the resultant bone meal lighter in color."

The existence and amount of this damage, being thus ascertained there remains to be considered only its cause.

That the damage was due to the unseaworthiness of the "Twohy" we feel is amply demonstrated in the preceding argument bearing on that vessel's condition.

The damage was caused by constant soaking in sea water, which dissolved some of the soluble constituents of the bones and brought the dirt, slime and mud out of the bilges and coated the bones therewith.

The existence and nature of this damage were necessarily the direct result of the unseaworthy condition of the "Twohy," for which the vessel and her owners are answerable, and it is, consequently, submitted that the finding of the lower court that the vessel was unseaworthy, and its award of damages for the injury to the cargo, should be and remain undisturbed.

B. The Libellant Was Entitled to a Decree for Loss Due to Short Delivery Clearly Proved to Have Occurred Through the Unseaworthiness of the "John Twohy."

1. *The Intake Weight.*

The intake weight of the cargo was prima facie established by the bill of lading—a clean bill—which was admitted by the pleadings and which acknowledged, without qualification, receipt of a full cargo of bones weighing 1,210,000 kilos, equivalent to 2,670,345 pounds avoirdupois, as admitted by paragraph 5 of the answer.

The claimants offered no evidence sufficient to rebut this prima facie proof of the intake weight, as will be hereafter more fully discussed.

The correctness of the bill of lading weight is strongly supported by additional evidence.

Captain Forsyth, master of the schooner, called as a witness on behalf of the claimants, described

(Record, p. 162), the careful method by which these bones were weighed as they were being loaded. The fact that the captain was satisfied to sign a clean bill of lading for this cargo without qualifying the statement of quantity by inserting the words, "shipper's weight," "weight unknown," "said to weigh" or any other equivalent expression is most persuasive of its correctness.

It further appears that this libellant had no incentive to pad the weights, inasmuch as the cargo was sold by it on the basis of the out-turn weight and also that the only person who might be interested in padding the intake weight, the stevedore, had, by the master's testimony (Record, pp. 162-163), nothing to do with the weighing.

Under these circumstances, it is submitted that the intake weight is clearly established as being 2,670,345 pounds.

2. *The Out-turn Weight.*

The out-turn weight, while a little more involved, is clearly established and has at no point in the case been disputed.

It was clearly shown by the witness Lyons (Record, p. 57), that the actual gross out-turn weight on the whole cargo was 2,583,581 pounds, of which 389,407 pounds were wet.

By the testimony of the witnesses Stocher (Record, pp. 62 and 63), and Burrichter (Record, p. 77), it was clearly established that the excess moisture in the 389,407 pounds of wet bones was sixteen per cent., or in weight 62,305 pounds.

No attempt has been made so far in this case, and we do not assume that any will be made in this court, to attack or impeach the correctness of this weight, but it should be mentioned in connection therewith, that the libellant (Record, pp. 38, 71, 78), settled with its

purchaser upon this basis and that the claimants in this cause settled with the libellant, upon this basis, their claim for freight for the transportation on this cargo from Buenos Aires to Philadelphia.

3. The Shortage.

Deducting from this intake weight of 2,670,345 pounds the out-turn weight of 2,521,276 pounds, leaves a net shortage of 149,069 pounds. The value of this quantity of bone at the time and place of delivery is undisputed and was $27 per net ton of 2000 pounds, less freight at the rate of $6 per gross ton of 2240 pounds, or $1613.14, the libellant's claim having been originally made in the sum of $1612.26 through a mathematical error in calculation.

4. Discussion.

(a) The Law.

Reference to the bill of lading (Record, p. 45), discloses that it acknowledges receipt of

> *"a full and complete cargo of bones weighing one million two hundred and ten thousand kilos, marked and numbered as per margin,"*

and in the margin appears:

> *"1,210,000 kilos bones. In this quantity is included 12,474 kilos in 287 bags."*

Nowhere in the bill of lading are these two statements of the quantity of bones in any way qualified by the insertion of "weight unknown," "shipper's weight," or any of the usual similar expressions.

It is well established that a bill of lading which acknowledges receipt of a quantity of goods without more, is strong prima facie evidence of the correctness of the quantity stated and until contradicted by the

most satisfactory proof to the contrary, is conclusive on the point.

The Lady Franklin, 8 Wallace 328;
Planter's Fertilizer Co. v. Elder, 101 Fed. 1001;
DeSola v. Pomares, 19 Fed. 373.

In *The Presque Isle*, 140 Fed. 302 (D. C. N. D. N. Y.), 1905, it was said:

"It is uniformly held that a bill of lading is prima facie evidence of the receipt of the merchandise and its condition at the time of delivery (4 Amer. & Engy. of Law, p. 728; Nelson v. Woodruff, 66 U. S. 156, 17 L. Ed. 97; Ellis v. Willard, 9 N. Y. 529; The T. A. Goddard [D. C.], 12 Fed. 174; Lazarus v. Barber [C. C. A.], 136 Fed. 543)."

And in *James v. Standard Oil Co.*, 189 Fed. 719 (D. C. So. D. N. Y.), the Court, holding that the vessel had conclusively established the delivery of all the cases received on board, held that the presumption arising from the statement of quantity in the bill of lading was overcome.

Holt, J., said:

"This is the number stated in the bill of lading, and the statement in the bill of lading of the number of cases received is strong prima facie evidence of such receipt, but it is not conclusive."

On appeal the decision was affirmed, 191 Fed. 827 (C. C. A., 2nd Circ.), Judge Ward saying, page 828:

"The bill of lading in respect to the quantity received is a receipt and, though entitled to great weight as an admission by the ship, it is not conclusive. *The burden lies upon the ship of thoroughly satisfying the Court* that she actually has delivered all the cargo she has received, and that *the bill of lading is erroneous.*"

Under these authorities and the circumstances of this case, the bill of lading weight must stand as correct unless the ship, in the words of Judge Ward, "*thoroughly satisfies the Court that she actually has delivered all the cargo she has received, and that the bill of lading is erroneous.*"

The rule being thus well settled by the decided cases, the question arises as to whether the vessel has in this case rebutted the presumption arising out of the admission contained in the bill of lading.

We submit that the ship does not sustain this burden so long as she leaves open and unanswered a reasonable explanation of the shortage, supported by and consistent with all the facts in the case, and under which she would be liable. In other words, the ship does not sustain the burden until she has conclusively established that there was no loss, and consequently the bill of lading weight was wrong, or else conclusively demonstrates that the loss was due to a cause for which the ship was not responsible.

(b) *Four Possible Explanations.*

In this case there are four possible explanations of the shortage:

First.—Mistake in the intake or bill of lading weight.

Second.—Mistake in the out-turn or delivered weight.

Third.—Natural shrinkage.

Fourth.—That the part of the cargo not delivered was pumped out on the voyage.

If the shortage was due to either of the first, second or third causes, the vessel would be excused from liability; if to the fourth cause, it would have to respond in damages.

So far in the case there has been no dispute as to the out-turn weight. The claimants contended that the shortage was due to mistake in the bill of lading or intake weight, to natural shrinkage or to a combination of the two. The libellant consistently maintained that the undelivered cargo was pumped overboard, and that the bill of lading weight was correct.

Bearing in mind that the burden rests upon the ship to "*thoroughly satisfy the Court that she actually has delivered all the cargo she has received and that the bill of lading is erroneous,*" let us examine the evidence to see how far, if at all, it sustains each or any of the four possible explanations of the shortage.

1. *The Intake Weight Was Correct.*

The unqualified statement of the weight of the cargo in the bill of lading is very strong prima facie evidence of its correctness, which in this case is supported by the other evidence in the case.

Captain Forsyth, the master, called as a witness on behalf of the claimants, testified that libellants' men weighed the bones as they were put aboard the schooner, and (Record, p. 162), described the method used, which seems to be careful and exact. He said:

> "They have a little trolley track lying in the yard, and they have a little flat trolley and the men will fill those baskets. This little trolley car is weighed in the morning with so many empty baskets. Then they will fill those empty baskets and put them on the trolley car, and run them down and put them on the scales, and each man will take a basket and carry it across the street and dump it down the hold."

In its essential particulars this system of weighing is the same as that which was used when the vessel was discharged, and which gave such satisfactory results.

The captain was so satisfied with the weighing at Buenos Aires that he was content to sign a clean bill of lading without inserting any of the customary qualifying phrases, such as "shipper's weight," "said to weigh," "weight unknown," etc., and presumably paid the stevedore on the basis of the weight shown.

The shipper, the libellant, had no incentive to pad the weights inasmuch as the cargo was sold on the delivered weight.

The stevedore, the only person interested in padding the weight, had, as the master testified (Record, pp. 162-163), nothing to do with the weighing.

All these matters tend most strongly to support the correctness of the bill of lading weight, and to give it an evidential value much greater than its mere presence in the bill of lading.

Against these facts there is no countervailing evidence sufficient to rebut them.

The captain testified that he delivered all the cargo he received. This is a mere statement of a conclusion, and if it were to be given controlling weight, shippers and consignees would be placed entirely at the mercy of unscrupulous masters. The other evidence does not support the captain's averment, which was predicated, as appears from his later testimony, on the fact that when the loading was completed, the hatches were closed and battened down, and were not again opened until the vessel berthed at Philadelphia, and that there was no opportunity for anyone to steal any of the cargo.

As we will point out later, these facts are entirely consistent with that which we contend is the true theory—namely, that the missing part of the cargo was pumped overboard with the water which leaked into the vessel, because of her unseaworthiness.

In this connection it is to be noted that the captain qualified his statement that he had delivered all

the cargo he received, when on cross-examination he admitted (Record, p. 171), that the fine particles of bone might have been pumped overboard.

Manifestly the statement of the captain, qualified as it is by his admissions on cross-examination, is not such evidence as will thoroughly satisfy the mind of the Court that the ship here delivered all the cargo she received, and especially is this true when we consider that it leaves entirely open the possibility, which we will later demonstrate to be the fact, that the cargo called for by the bill of lading, and not delivered, was actually pumped overboard as the result of unseaworthiness of the vessel.

We feel that it cannot for a moment be successfully maintained that a ship can rebut the strong prima facie evidence of an unqualified admission in a bill of lading by an explanation which leaves entirely unanswered a wholly reasonable explanation of the loss which is entirely consistent with all the facts proved in the case.

The only other evidence which it could be argued might tend to impeach the correctness of the bill of lading weight is that referred to by the District Court where it calls attention to the fact that although the bill of lading calls for 287 bags of an average weight of 98 pounds apiece, the out-turn shows the delivery of 241 bags, averaging in weight about 84½ pounds each.

A further examination of the evidence, however, discloses that there is no basis to support the presumption sought to be raised.

In addition to the 241 bags counted, a very considerable number of bags were broken, and were heaved up on deck, together with the bones they had contained.

No one counted the broken bags, and when the master was asked by the Court whether he thought as

many as forty-six bags were broken, replied, "They must have been" (Record, p. 161).

The presumption that there was a shortage in the number of bags in the out-turn is purely speculative as there is no evidence whatsoever as to the actual number of bags delivered.

So, too, with any argument based on the difference between the average intake and out-turn weights of the bags.

These bags were of all sizes, and in no way uniform in weight or otherwise. It is exceedingly doubtful whether they were tightly sewed, and it is most likely that a great quantity of the contents could have fallen out, even from the bags that were discharged with bones still in them.

The method of loading was exceedingly likely to break the bags, as was also the working of the cargo on the voyage from Buenos Aires to Philadelphia, and under the conditions attending the loading and carriage of this cargo, and the rough handling to which it was subjected, the bags most likely to break would be the ones most heavily filled.

Any argument based on the difference between the average intake and out-turn weights of the bags is therefore entirely speculative.

It is thus apparent that to argue from the difference in count and average weight of the bags of bones, is to pile speculation upon speculation to reach a result so wholly speculative as to be impossible of belief.

The existence of the shortage is equally consistent with any explanation that may be made of it, and consequently cannot be urged as impeaching the correctness of the bill of lading weight.

We, therefore, submit that the evidence in this case tends much more strongly to support than it does

to impeach the correctness of the intake weight, as set forth in the bill of lading.

Especially is this true in view of the fact that the evidence most clearly establishes an explanation of the shortage entirely consistent with the correctness of the bill of lading weight, and much more reasonable then the appellants' theory that the bill of lading weight is erroneous.

2. The Correctness of the Out-turn Weight Is Not Questioned.

The out-turn weight has not been, and, we assume, will not be, questioned in this case. Its correctness was clearly demonstrated by the testimony of the witnesses, Lyons, Stoeher and Burrichter. The bones were carefully weighed as they were taken from the ship, and the excess moisture in the wet portion of the cargo was accurately determined by carefully and properly conducted tests. The claimants accepted payment of their freight, and the libellant settled with the vendee of the cargo on the basis of the weight thus determined, and there is nowhere in the evidence any suggestion that it is not entirely correct.

The out-turn weight must therefore be taken as conclusively established.

3. There Was No Natural Shrinkage in Weight on the Voyage.

In their efforts to avoid liability for the shortage, claimants argue that there is generally shortage in these bone cargoes. This may in fact be admitted. The only testimony as to the extent of such a usual shortage, however, is that of the witness, Burrichter, who testified that the customary shortage is from one to two per cent. as a fair average; that three per cent. or four per cent. would be very unusual. In the pres-

ent case, the shortage is approximately five and six-tenths per cent., far in excess of even what would be considered very unusual.

Clearly this defense, if sustained on the facts in the case, could not be available to the schooner to any extent greater than the ordinary or customary shortage of one or two per cent.

We submit, however, that no allowance can in this case be made for any shortage on the ground of customary shrinkage inasmuch as the facts here exclude the possibility of the existence in this case of the causes of such shrinkage on the ordinary voyage.

From the evidence, it appears clearly that the only explanation that can be given of the ordinary shortage is that bones dry out during the voyage (Record, p. 158). It also appears from the evidence that bones when soaked in water act like sponges, and become saturated, and when exposed to dampness will absorb moisture from it (Record, pp. 77 and 78).

Under these conditions, not only was there in this case no opportunity for any drying out of the cargo, but, on the contrary, under the conditions surrounding the transportation of this cargo there should be an accretion in weight rather than a shortage.

On the voyage of the "Twohy" here in question the undisputed evidence is that for a period of upwards of two months her hold constantly had a considerable quantity of water in it, that at times this water was five feet deep in the hold—and that during this period the vessel was leaking at the rate of six inches an hour. The hatches were tightly battened down and covered.

A great quantity of the bones was constantly soaking in the water in the hold, and, coming up through the tropics, it is clear that the atmosphere in the space in the hold of the vessel above the water must have been very moist.

These facts rendered it altogether impossible for the bones in this cargo to dry out on the voyage, and it is manifest that in this particular case the explanation of the shortage cannot be sustained as a usual and customary thing.

The shortage here was far in excess of the average and, in fact, *was practically double what would be and is considered a very unusual and excessive shortage.* In the second place, the cause of the usual shortage, viz., drying out on the voyage, could not have been and was not operative in this case. Owing to the constant flooded condition of the hold of this vessel, the cargo here should have shown on delivery an increased rather than a decreased weight.

The excess moisture contained in the wet bones alone was much more than sufficient to counterbalance the one per cent. or two per cent. loss in weight which it was stated would be the fair average. In addition to this, however, we have in the present case a difference of 86,746 pounds between the established intake weight and the gross out-turn weight. Manifestly the usual or customary drying out on the voyage cannot explain the loss existing in this case.

From the foregoing discussion, it is manifest that the three possible explanations of the shortage which would free the ship from liability are not supported by the evidence in this case, and it remains to consider the fourth possible explanation.

4. *The Part of the Cargo Not Delivered Was Pumped Overboard During the Voyage.*

The fourth possible explanation, the one which the evidence demonstrates was in fact the true cause of the shortage, is that the missing part of the cargo was pumped overboard during the voyage in the form of ammonia and phosphoric acid in solution, and in the form of fine particles of bone.

For two months on this voyage this vessel was constantly leaking at the rate of six inches of water an hour. At times there was as much as five feet of water in the hold. During all this time a large quantity of bones were constantly soaking in the water, and, when chemically analyzed after being discharged at this port, were found to be largely deficient in certain of their soluble constituents—in the ammonia to the extent of ¾ per cent.; in phosphoric acid to the extent of 6½ per cent., or, in all, to the extent of 23,795 pounds. It is obvious that to this extent the shortage is accounted for by the pumping overboard of this quantity of ammonia and phosphoric acid in solution.

As to the remainder of the shortage the evidence clearly sustains the theory that it was pumped overboard in the form of fine particles of bone—bone dust. The master, it is true, first testified that the bone could not have gotten into the pumps, but when cross-examined he excluded from his statement the fine bone particles and admitted that these might have been pumped overboard (Forsyth, p. 144).

A very large part of the cargo when loaded was in the form of this fine machine-crushed bone—the process of loading and the motion and working of the cargo during the voyage, all would operate to reduce still more of it to this condition. As Stoeher testified (Record, p. 70):

> "Q. When you say these bones were cracked bones, give the Court some idea just how large the bones were.
>
> A. They were various sizes, pieces about the size of, say, a small finger nail, a kernel of corn, and smaller. They are down to very small pieces, and they would break just by the process of abrasion, piece against piece.
>
> Q. So that when you speak of meal, you speak of very, very fine ground bone, and some of this bone was fine bone, was it not?
>
> A. Yes, sir."

These finer particles would all sift to the bottom of the hold, and thence through the ceiling into the pumps, and thence overboard.

Under ordinary conditions, perhaps, the quantity of bone pumped overboard might seem large; but in view of the heavy leakage, the practically constant pumping and the thousands of tons of water that must have been pumped out of this vessel in two months, while she was leaking at the rate of about twelve feet of water a day, the amount of bone pumped overboard becomes insignificant.

There is nothing in the facts shown or attempted to be shown at the trial which is inconsistent with this last explanation of the shortage, as there is with the others; but, on the contrary, the evidence and the facts clearly point to the last explanation as the true manner in which the shortage occurred.

The foregoing explanations of the shortage are the only ones possible.

Can it be held that the ship has sustained the burden of proving the incorrectness of the bill of lading weight by "*thoroughly satisfying the Court that she actually has delivered all the cargo she has received and that the bill of lading weight is erroneous*" when she in no way has excluded the explanation of the loss which is demonstrated by the overwhelming weight of the evidence to have been the true explanation and under which the ship is liable?

We submit that the evidence most clearly establishes the vessel's liability and that the District Court erred in failing to award to libellant its full claim.

It remains to note a suggestion found in the opinion of the District Court, and which, if the incorrectness were not pointed out, might tend to a perpetuation of the same error as that committed by the trial Judge, who, in his opinion (Record, p. 190), said:

"At the same time, the part of the cargo which had been dissolved by the action of the salt water and thus lost to the shipper would be included in any claim for damage made because of the cargo having become wet. It is, therefore, important to keep clear the distinction between the shortage in the cargo as such and a loss in bulk or weight of the cargo due to the damage from salt water, lest the two claims be permitted to overlap, and in this way there be a double allowance of the damage claim."

From this it is clear that the trial Judge felt that if the libellants' claim were allowed in full, there would be an overlap and double damages awarded. This thought was based on the fact that in showing the nature of the damage to the cargo, libellant showed that the damaged bones were deficient in some of their soluble constituents, and from this the Court reasoned that the allowance of the libellants' claim for damage would also reimburse libellant for the shortage up to the amount of the dissolved and lost constituents of the damaged bone.

This is most clearly and demonstrably wrong. The damage claim is purely and simply the difference between the contract price and the actual market value in its damaged condition of the net delivered weight of the injured portion of the cargo, and is not in any way based on the quantity or value of the missing constituents of this damaged bone.

Furthermore, the error of the trial Court's theory is most clearly demonstrated mathematically by the accompanying table on the opposite page.

From this table it is perfectly obvious that the full allowance of both claims here made on behalf of the libellant-appellee will involve no overlap or double damage whatsoever, but, on the contrary, will only make the libellant whole for the damage it suffered owing to the unseaworthiness of the schooner.

ANSWER TO THE THEORY OF COURT BELOW AS TO OVERLAP AND DOUBLE DAMAGES.

1. If all the bones called for by the Bill of Lading had been delivered, Libellant would have received:				
2,670,345 lbs. @ $27.00 per 2000 lbs.		$36 049 66		
Less Freight on same @ $6.00 per 2240 lbs.		7 152 70		
Net receipts			$28 896 96	
2. Libellant on the cargo actually delivered did receive:				
2,194,174 lbs. @ $27.00 per 2000 lbs.	$29 621 35			
327,102 lbs. @ $21.30 per 2000 lbs.	3 483 64			
Less Freight on 2,521,276 lbs. @ $6.00 per 2240 lbs.		33 104 99		
		6 753 42		
Net receipts			26 351 57	
3. Actual Loss to Libellant				$2 545 39
4. If full recovery allowed, Libellant will receive:				
Damages for injury to 327,102 lbs. @ $5.70 per 2000 lbs.			932 24	
Damages for short delivery 149,069 lbs. @ $27.00 per 2000 lbs.		2 012 43		
Less Freight on 149,069 lbs. @ $6.00 per 2240 lbs.		399 29	1 613 14*	
Net recovery				2 545 38
5. Excess of Loss over Recovery				01

*Through a mathematical error in original calculation of the Libellant's claim the value of the bones not delivered is stated as $1612.28—the correct figure is that given above—$1613.14.

3. The Action of the Circuit Court of Appeals Was Improper.

From the foregoing discussion all the facts involved and the action of the District Court clearly appear. With the record in this condition an appeal was taken by claimants to the Circuit Court of Appeals, which appeal was perfected on April 27, 1918. On December 9, 1918, after having twice asked and obtained continuances of the hearing on appeal, the claimants moved to withdraw their appeal, and over the protest and objection of the petitioner here, the Court granted the claimants' motion on term. On March 14, 1918, a formal order was entered, dismissing the appeal as moved by the claimants.

A. The Action of the Circuit Court of Appeals Is Inconsistent With the Rulings of This Court in Irvine v. "The Hesper" and Reid v. The American Express Co. and Nullifies the Rule That on an Appeal in Admiralty the Case Is Tried de novo in the Circuit of Appeals.

Under the decisions of this Court in *Irvine v. "The Hesper,"* 122 U. S. 256, and the many cases following that decision, particularly the recent emphatic approval of its doctrine by his Honor, the present Chief Justice, in *Reid v. American Express Company*, 241 U. S. 544, an appeal in Admiralty vacates the decree of the District Court, and brings the whole case before the Circuit Court of Appeals for a trial de novo.

As stated by Mr. Justice Blatchford in *Irvine v. "The Hesper"* (*supra*), at page 266:

> "It is well settled, however, that an appeal in admiralty from the District Court to the Circuit Court vacates altogether the decree of the District

Court, and that the case is tried de novo in the Circuit Court. Yeaton v. United States, 5 Cranch 281; Anonymous, 1 Gallison 22; 'The Roarer,' 1 Blatchford 1; 'The Saratoga' v. 438 Bales of Cotton, 1 Woods 75; 'The Lucille,' 19 Wall. 73; 'The Charles Morgan,' 115 U. S. 69, 75. *We do not think that the fact that the claimants did not appeal from the decree of the District Court alters the rule. When the libellants appealed, they did so in view of the rule and took the risk of the result of a trial of the case de novo. The whole case was opened by their appeal, as much as it would have been if both parties had appealed, or if the appeal had been taken only by the claimants.*" (Italics ours.)

This holding was reaffirmed in *Reid v. The American Express Co.* (supra), where his Honor, the present Chief Justice, said:

"It is not denied that in the Second Circuit the right to a de novo trial was considered as settled by Munson S. S. Line v. Miramar S. S. Co., Limited, 167 Fed. Rep. 969, and that a well-established practice to that effect obtained, but it is insisted that a general review of the adjudged cases on the subject will show the want of foundation for the rule and practice. But we think this contention is plainly without merit and that the right to a de novo trial in the Court below authoritatively resulted from the ruling in Irvine v. 'The Hesper,' 122 U. S. 256, a conclusion which is plainly demonstrated by the opinion in that case and the authorities there cited and the long continued practice which has obtained since that case was decided and the full and convincing review of the authorities on the subject contained in the opinion in the Miramar Case. Entertaining this view, we do not stop to consider the various arguments which are here pressed upon our attention tending at least indirectly to establish the nonexistence of the right of trial de novo in the Court

> below or that this case for reasons which are wholly unsubstantial may be distinguished and made an exception to the general rule, because to do so would serve no useful purpose and would be at least impliedly to admit that there was room to discuss a question concerning which there was no room for discussion whatever."

What do these cases mean? Obviously and necessarily they mean what they say, that in an admiralty appeal the Circuit Court of Appeals is not sitting as a court of review, but as a trial court, hearing and determining the case upon the pleadings and proofs submitted in the District Court and any additional proofs that may be properly introduced in the Circuit Court of Appeals.

Is it conceivable that any trial court has the legal discretion, at the defendant's request and over the protest and objection of the plaintiff, to refuse to hear and determine the claim made by the plaintiff against the defendant where the parties and subject matter are properly before the court and within its jurisdiction?

Manifestly it cannot do so; and yet, such is the necessary result of the ruling of the Circuit Court of Appeals in this case, inasmuch as under the decisions in *Irvine v. "The Hesper"* and *Reid v. The American Express Co.*, the Circuit Court of Appeals must be regarded in this case as a trial court.

This point here raised is a novel one, as was recognized in the opinion of Judge Buffington in this case when he says (Record, p. 204):

> "We find no reported case involving the precise question here raised."

The decision of the Circuit Court of Appeals in this case has a most far-reaching effect. Its scope is wide and its application broad. If it is to stand, an

appellee in admiralty, a part of whose claim was denied in the District Court, can no longer rely upon the decisions of this Court in *Irvine v. "The Hesper"* and *Reid v. The American Express Company*, to secure him his right to be heard thereon in the Circuit Court of Appeals. To protect himself he will be under the necessity of assuming the burden and expense of taking a cross appeal, thereby encumbering the record and adding most materially to the expense, annoyance and inconvenience of litigation, increasing its complexities, and in most cases undoubtedly, causing additional delay—already one of the greatest objections and most serious defects in the administration of justice.

It is suggested in the opinion of Judge Buffington in this case that to refuse the motion and hold the appellant not entitled to withdraw his appeal will work a great hardship to the appellant by limiting his control of his litigation. But this suggestion is a mistaken one.

In the words of Mr. Justice Blatchford in *Irvine v. "The Hesper,"*

> "When the libellants appealed they did so in view of the rule, and took the risk of the result of a trial of the case de novo."

The appellant, therefore, is confronted by no hardship—he acts with his eyes open.

The result of refusing to permit the appellant in such case to withdraw his appeal over the appellee's objection would, on the other hand, be most wholesome.

It would go far to curb and put an end to the taking of hasty and ill-advised appeals, would secure to the appellee his right to be heard de novo without the necessity of complicating the admiralty procedure by taking a cross appeal, and would prevent the most pat-

ent injustice to an appellee who, in proper reliance upon the decisions of this Court in *Irvine v. "The Hesper"* and *Reid v. The American Express Company*, has felt secure in his right to be heard, would otherwise find that this right has been swept away from him at a time when his own right to appeal had expired and he was no longer able to avail himself thereof.

While there seem to be no Federal Court decisions on the precise point here raised, there have been one or two State Court decisions thereon and these plainly and clearly support the rule for which we here contend.

In *Peterson v. Frey*, 109 Mich. 689, a case where an appeal was taken under a statute which provided that the appellate court should *"become possessed of the case, the same as if it had been originally commenced in said Appellate Court,"* it was held that an appellant could not dismiss his appeal without the consent of the appellee.

In *Brigham v. Waterhouse*, 32 Texas 468, a case where under the statute an appeal effected a trial de novo in the appellate court, it was held that the appellant could not withdraw his appeal without the consent of the appellee.

The rule announced in these cases is, we submit, correct and consistent with good practice and the decisions of this Court.

What discretion an appellate court has to permit the withdrawal of an appeal is necessarily limited by legal precedents and rules, and certainly should not and cannot be exercised to deprive an appellee of a valuable and substantial right.

In the present case, and in all cases where by an appeal the cause is brought before the appellate court

for a trial de novo, an appellee, a part of whose claim has been denied in the District Court, has a right to have the appellate court hear and determine his claim de novo, as a court of first instance.

This right is a valuable and substantial one, of which the appellee should not be deprived without his consent, and we submit that it is no more within the legal discretion of the appellate court in such a case to deprive the appellee of this right, than it is within the discretion of any other trial court at the defendant's request and over the plaintiff's objection to refuse to hear and determine on its merits a cause in which the parties and the subject-matter are properly within its jurisdiction and before it for determination.

IV. CONCLUSION.

In conclusion we submit:

First.—That the action of the Circuit Court of Appeals in permitting the claimants in this case to withdraw their appeal was improper, inconsistent with the decisions of this Court, and, if allowed to stand uncorrected, will complicate the admiralty practice, go far to nullify important decisions of this Court and will work the greatest injustice to litigants who act in reliance upon the decisions of this Court for the protection of their rights and the conduct of their litigation.

Second.—That the Circuit Court of Appeals in this case should have heard and determined on its merits the whole case brought up by the appeal from the District Court.

Third.—That the action of the District Court in refusing to award the petitioner the full damages claimed by it was erroneous and should be reversed.

Fourth.—That the petitioner before this Court should be awarded the full amount of its claim with damages equivalent to interest thereon from January 15, 1916, and costs.

Respectfully submitted.

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HARRINGTON, BIGHAM & ENGLAR,
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WILLIAM J. CONLEN,
Advocate.